SUPREME COURT, U. S.

OCT 9 1973

MICHAEL RODAK, JR., CLERK

No. 73-329

# In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN J. MARRA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 9-24) is not yet reported. The opinion of the district court (Pet. App. B 25-29) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 1973. The petition for a writ of certiorari was filed on August 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether a revenue agent's discussion with a taxpayer's representative of proposed civil adjustments prior to his suspicion of any criminal conduct constitutes a representation by the agent that no criminal investigation will ensue so that self-incriminating evidence disclosed by the taxpayer cannot be used against him in a later criminal proceeding.

## CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the Fourth and Fifth Amendments are set forth at Pet. App. C 30.

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of willfully making and subscribing a false tax return in violation of 26 U.S.C. 7206(1). The court of appeals affirmed (Pet. App. A).

Petitioner does not challenge the sufficiency of the evidence. His argument is solely directed at the denial of his motion in the district court to suppress certain incriminating evidence made available by him to the revenue agent prior to the time the criminal investigation commenced. Petitioner asserts that the conduct of the revenue agent implied that the civil audit was to be closed and that no criminal investigation would be made. He claims that he was misled into disclosing evidence incriminating himself in reliance on the revenue agent's conduct.

The evidence showed that the revenue agent initially informed petitioner in early 1968 that his 1965 and 1966 individual income tax returns were to be audited. Petitioner referred the agent to his accountant, Edward Derbabian, C.P.A. (R. 7a).[1] In February 1968, the agent submitted several lists of requested information to Mr. Derbabian (R. 17a-27a, 181a-190a), including a handwritten list entitled "Proposed Changes" (R. 17a-21a, 181a-184a). This list outlined various problem areas and requested substantiation with respect to several issues. The agent also wrote two letters to petitioner (R. 28a-29a) requesting additional information. The first letter of July 10, 1968 stated (R. 28a):

> I am meeting with Mr. Derbabian July 17, 1968. Completion of the audit will be expedited if you

[1] "R." references are to the record appendix in the court of appeals.

> could provide him with the above information by that date.

On the day following the July 17 meeting, the agent again wrote to petitioner and concluded (R. 29a):

> If you can assist Mr. Derbabian in obtaining, for our appointment July 24, 1968, the items he has listed then the audit may be completed in the very near future.

Only after the July 24 meeting, at which petitioner's accountant failed to explain satisfactorily the questioned areas, did the revenue agent suspect that there was a possibility of underpayment of taxes due to fraud. The agent thereupon referred the case to the Intelligence Division of the Internal Revenue Service for possible criminal investigation (R. 174a).

## ARGUMENT

1. Both courts below correctly rejected petitioner's attempt to suppress evidence voluntarily given by him during a civil audit at which time the revenue agent had no basis for suspecting that there was fraud. It is the settled rule that there must be clear and convincing evidence of fraud, trickery or deceit by the revenue agent upon the taxpayer which materially misrepresents the nature of the inquiry in order to justify suppression. *United States* v. *Stribling,* 437 F. 2d 765, 771-773 (C.A. 6), certiorari denied, 402 U.S. 973; *United States* v. *Tonahill,* 430 F. 2d 1042, 1044 (C.A. 5) certiorari denied, 400 U.S. 943; *United States* v. *Prudden,* 424 F. 2d 1021, 1033 (C.A. 5), certiorari denied, 400 U.S. 831; *Cohen* v. *United States,* 405 F. 2d 34, 36 (C.A. 8), certiorari denied, 394 U.S. 943; *United States* v. *Parenti,* 326 F. Supp. 717, 723 (E.D. Pa.), affirmed *per curiam,* 470 F. 2d 1175 (C.A. 3), certi-

orari denied May 7, 1973 (No. 72-1156); *Biggs* v. *United States,* 246 F. 2d 40, 44 (C.A. 6), certiorari denied, 355 U.S. 922.[2]

Contrary to petitioner's contention (Pet. 5), the revenue agent's mere discussion of proposed civil adjustments with petitioner's representative during the audit did not constitute a representation that no criminal proceedings would thereafter be brought. Although the list submitted by the agent to petitioner's representative was entitled "Proposed Changes," it was in fact a request for further substantiation and could not in any way be interpreted as an offer to settle the case on a civil basis. Moreover, petitioner cannot claim to have been misled by the initial civil audit. As the Second Circuit stated in *United States* v. *Sclafani,* 265 F. 2d 408, 414-415, certiorari denied, 360 U.S. 918:

> A "routine" tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.

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[2] Petitioner's reliance (Pet. 6) upon *Gouled* v. *United States,* 255 U.S. 298, is misplaced. There, after a criminal investigation had commenced, government officials, pretending to make a friendly call upon the defendant, gained admission to his office and in his absence, without any warrant, seized and carried away several documents. Similarly, *United States* v. *Guerrina,* 112 F. Supp. 126 (E. D. Pa.), cited by petitioner (Pet. 7), involved agents' examinations of the taxpayer's records in his absence and without his authorization.

It was only after petitioner's representative failed to satisfy the agent that the latter began to suspect possible fraud. "The investigation thus concluded with exactly what is a foreseeable result of any income tax return audit, should the audit develop evidence of fraud." *United States* v. *Wheeler*, 256 F. 2d 745, 746 (C.A. 3). See also *United States* v. *Squeri*, 398 F. 2d 785, 788 (C.A. 2); *Spahr* v. *United States*, 409 F. 2d 1303, 1306 (C.A. 9), certiorari denied, 396 U.S. 840.

2. Apart from the fact of the civil audit itself, petitioner has not identified any act of the revenue agent which might constitute fraud, deceit, or trickery. The agent had no suspicion of any criminal wrongdoing either at the time he submitted his request for information in February 1968 or in July when he wrote to petitioner. Moreover, nothing done or alleged to have been done by the agent indicates that any subsequently discovered criminal conduct would be ignored by the Internal Revenue Service. As the district court found (Pet App. B 28): "* * * the affidavit [in support of petitioner's motion to suppress] fails to specify any affirmative acts of misrepresentation or deceptions by the agent."

Despite this failure, petitioner argues (Pet. 7) that the operative legal test should be "the subjective effect which the actions of the Revenue Agent have *in the mind of the taxpayer** * *" (emphasis in original). But the state of mind of either petitioner or his representative during the audit cannot be demonstrated by objective means. It therefore "can hardly be the basis for an allegation of fraud and deceit." *United States* v. *Parenti, supra*, 326 F. Supp. at 723. Without specific evidence, petitioner's "broadside charge of fraud, deceit, trickery and misrepresentation" *(ibid)* is to no avail.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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